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MISCELLANEOUS

Statutes:

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 938

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

ABERDEEN & ROCKFISH R. CO., ET AL., APPELLEES

On Appeal from the United States District Court for the Eastern District of Louisiana, New Orleans Division

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BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

The opinion of the district court (A. 325-356) is reported at 270 F. Supp. 695. The reports of the Interstate Commerce Commission (A. 18-132; 176-186) are published at 325 I.C.C. 1 and 325 I.C.C. 449.

JURISDICTION

The judgment of the three-judge court was entered on August 22, 1967 (A. 357). The notice of appeal

was filed on October 23, 1967 (A. 5, 371). Jurisdiction to review the district court's decision is conferred by 28 U.S.C. 1253 and 2101(b). *Chicago and N.W. Ry. Co.* v. *Atchison, T. & S.F. Ry. Co.*, 387 U.S. 326; *Baltimore & O. R. Co.* v. *United States*, 298 U.S. 349. Probable jurisdiction was noted on March 4, 1968 (390 U.S. 940), and this appeal was consolidated with the appeal from the same judgment in *The Baltimore and Ohio R.R. Co.* v. *Aberdeen & Rockfish R.R. Co.*, No. 925, this Term.

QUESTION PRESENTED

A petition filed with the Interstate Commerce Commission under Section 15(6) of the Interstate Commerce Act [49 U.S.C. 15(6)] sought modification of Commission-prescribed divisions of joint rates applying over the lines of more than 200 railroads for the interterritorial transportation of virtually all North-South freight.[1] After considering evidence and upon making findings relating to each of the Section 15(6) criteria, the Commission concluded that the existing divisions were unjust, unreasonable and inequitable and it prescribed new divisions in proportion to the relative costs of the two groups of carriers in handling the traffic at issue.[2] The cost figures used by

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[1] Except coal, certain trailer-on-flatcar traffic, and border point traffic embraced in another proceeding entitled Docket No. 32055 (A. 86).

[2] The Commission prescribed a special basis of divisions for the Norfolk Southern Railroad covering traffic originated or terminated on its line when that railroad demonstrated that its circumstances and conditions were sufficiently unlike

the Commission were derived from Rail Form A, which produces average unit costs for territorial freight service, although the Commission made certain adjustments to reflect more accurately the costs of the particular traffic involved. In rejecting adjusted Rail Form A costs as a proper yardstick for this purpose, the district court held that the Commission was required to base its computations on more refined cost data.

The question presented is whether, in ascertaining the relative costs of service in an interterritorial divisions case, the Commission may rely on Rail Form A data as to territorial average costs, adjusted to more accurately reflect the costs of the particular traffic involved, or is required to develop more refined cost data.

STATUTES INVOLVED

Section 1(4) of the Interstate Commerce Act [49 U.S.C. 1(4)], and Sections 8(b) and 10(e) of the Administrative Procedure Act [5 U.S.C. 557(c) and 706] are set forth in Appendix A to appellants' brief in the companion case, No. 925, this Term.

Primarily involved is Section 15(6) of the Interstate Commerce Act [49 U.S.C. 15(6)], which provides, in pertinent part:

> Whenever * * * the Commission is of opinion that the divisions of joint rates, fares, or charges applicable to the transportation of passengers or

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those of the other Southern carriers as to merit individual treatment. The special divisions for the Norfolk Southern are not in issue.

property, are or will be unjust, unreasonable, inequitable, or unduly preferential * * * the Commission shall by order prescribe the just, reasonable and equitable divisions thereof to be received by the several carriers * * *. In so prescribing and determining the divisions of joint rates, fares and charges, the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers; and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare, or charge.

STATEMENT

1. INTRODUCTION

This appeal involves the district court's imposition of novel cost standards for the Commission to follow in exercising its Section 15(6) authority to prescribe just, reasonable and equitable divisions of joint rates.[3]

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[3] A joint rate is established when two or more carriers publish a single charge for their joint carriage of freight from an origin point on one line to a destination on another. The proportion of a joint rate received by each of the carriers as its share of the revenue received for the joint service is commonly known as a "division."

The case arises out of the Commission's 1965 order prescribing new divisions of the revenues derived from the transportation of interterritorial freight traffic moving under joint rates between all points in the Northern and Southern [4] sections of the eastern part of the United States.

2. PROCEEDINGS BEFORE THE COMMISSION

The Commission's order here under review modified the divisions of North-South freight revenues it had previously prescribed in *Official-Southern Divisions*, 287 I.C.C. 497 (1953). In its 1953 order, the Commission based its prescription of equal-mileage factor divisions [5] upon a finding that, in computing relative costs of service for the groups of carriers concerned under Rail Form A standards, "the safest assumption for the future * * * [is] that neither contesting group will have an appreciably lower basis of operating costs than the other, and that there are no other relevant circumstances which are of sufficient importance to justify higher divisional factors for one group than

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[4] The North embraces Official Territory, which lies generally east of Lake Michigan, Chicago, Peoria, and Cairo, Illinois, and St. Louis, Missouri, and north of the Ohio River and Norfolk, Virginia. The South embraces Southern Territory, which lies south of Official Territory and east of the Mississippi River.

[5] These equal-factor divisions provided equal compensation for the same amount of service performed by the Northern and Southern railroads. Thus, for shipments moving 500 miles in each territory, the Northern and Southern railroads would each receive 50% of the joint rate (287 I.C.C. at 547, 552).

the other" (287 I.C.C. at 526). Upon Northern lines' petition for rehearing and modification alleging, among other things, that Northern lines' costs were now substantially higher than those of the Southern roads, the Commission reopened the proceedings for further hearing. (A. 20, 377-384, 414-415).

During the lengthy hearings that followed, both groups of carriers introduced evidence which sought to demonstrate the unfairness of the existing divisions and that each group was entitled to a larger share of the joint rates than previously received. The Commission considered 80 verified statements containing direct testimony and numerous attached exhibits, 30 additional exhibits introduced at the hearings and over 2700 pages of testimony on cross-examination.[6] Upon completion of the administrative proceeding in 1965, the Commission found that the existing divisions were in violation of Section 15(6) in that they allocated to the Northern lines a lesser share of the revenues from the joint rates than would be warranted by their share of the expenditures in providing the joint service (A. 79-80).

The Commission reached this conclusion after considering and making findings as to each of the criteria specified for "due consideration" in Section 15(6), as

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[6] Evidence considered by the Commission included detailed traffic studies based on actual movements (A. 25-31); the carriers' revenue shares received under the then existing divisions in a representative year (A. 29, 46-48); economic trends (A. 31); operating and revenue trends (A. 33-37); efficiency of operations (A. 37-39); elaborate cost studies based on Rail Form A (A. 39-50); and extensive data on various cost factors (A. 87-130).

applied to each of the two contendings groups of railroads. It found all of the relevant factors, except for costs, to be substantially equal,[7] but concluded that computations under Rail Form A cost standards, which it adjusted and restated to more accurately reflect North-South traffic, established a decisive difference in the relative costs of rendering the service involved.

More specifically, both groups of carriers tried and submitted their cases on the basis of fully distributed costs computed under Rail Form A, although the Southern lines presented twelve adjustments which, they asserted, would improve the accuracy of the Rail Form A figures so derived for the traffic involved (A. 40, 46-47). The Northern lines introduced other detailed data establishing the validity of Rail Form A costs as a proper standard of measurement and the impropriety of the Southern lines' proposed adjustments. The disputes over applicability of Rail Form A costs and the various proposed adjustments occupied a large part of the administrative record. However, as the Commission pointed out (A. 46-48), the only essential difference between the carrier groups related to the degree to which Rail Form A territorial unit costs of all traffic should be modified to fit the

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[7] The Commission found that both groups of carriers are being operated efficiently and neither group should be considered as more or less efficient than the other (A. 39); that there are no differences in importance to the public attributable to the services of the two groups (A. 51); and that no adjustment over and above divisions based upon costs was warranted for either group on the grounds of greater revenue needs or otherwise (A. 79).

specific work units of the traffic at issue, and to the meaning and significance of the Southern lines' suggested adjustments.

In a comprehensive analysis accepting five and rejecting seven of the Southern lines' adjustments as unsound or based on unsupported and inapplicable facts or assumptions, the Commission concluded that its restated Rail Form A costs, which were based on Southern lines' cost and traffic studies except as to the rejected adjustments, "more reliably," "accurately," and "adequately reflect the costs which are attributable to the traffic at issue" (A. 48-49, 77-78, 87-129). Upon consideration of such cost data, the Commission concluded that its "restatement of the costs, which are reasonably accurate and reliable for purposes of determining the relative contribution by the groups on a cost-of-service basis, shows that the cost level in 1956, the year both groups used in the final cost analysis, is somewhat higher in the North than in the South for like services. A consideration of all factors indicates that this situation will most likely continue in the immediate future" (A. 78).

Noting that in the sample year selected by the Southern lines "the Northern lines received 44.64 percent of the revenue while incurring 46.35318 percent of the fully distributed costs," the Commission determined that "[i]t is clear that an adjustment in the divisions is required to compensate the respective groups according to their expenditures in the joint effort of handling this interterritorial traffic. To the extent that the present divisions do not meet this test," the Commission concluded, "they are unjust,

unreasonable and inequitable" (A. 80). Accordingly, the Commission prescribed new divisions in the form of scales of divisional factors (A. 130) which "are based on the fully distributed costs and divide the revenues in the same proportion to those costs" [8] (A. 80), finding that "the results achieved through application of the divisional mileage scales here prescribed will for the future be just, reasonable, and equitable * * *" (A. 80).[9]

Under the newly prescribed scale of divisional factors, tables of integers arranged by mileage blocks (in 50 mile increments) are used to compute percentages for dividing the joint rates [10] which produce approxi-

[8] Southern lines requested the prescription of divisional scales based on costs urging that "[t]o the extent, if at all, the Examiners are found to be correct in their rejection of specific aspects of the Southern lines' cost evidence * * *, the cost evidence, as thus modified, would provide the basis for constructing the divisional scales" (A. 1361-1363). In agreeing with the Southern lines, the Commission prescribed new divisions on that basis.

[9] In its Supplemental Report, the Commission reaffirmed its conclusions that revised divisions were required and that the cost data of record it used provided an adequate evidentiary basis for the newly prescribed divisional scales (A. 181-183).

[10] Scales of divisional factors are tools for accomplishing the division of revenues by the use of common fractions to calculate percentages which are then used to divide the revenue from a given shipment of freight. For example, if the haul for an originating Northern line were 300 miles and the haul for the terminating Southern line were 500 miles, the scales selected by the Commission prescribe 241 integers for the originating Northern road and 321 integers for the terminating Southern road (A. 130). The sum of these factors is 562. Reduced to percentages, the Northern road would re-

mately $496 million in revenues annually. The shift in revenues which would result from the new divisions is approximately $8 million a year. This amounts to an overall increase in the revenues of the Northern lines from the traffic involved of 3.5 percent and a reduction in Southern lines' revenues of approximately 3 percent (A. 80, 181-182).

3. PROCEEDINGS BEFORE THE DISTRICT COURT

In March 1965, the Southern lines brought the instant suit before a three-judge district court in the Eastern District of Louisiana to enjoin the enforcement of and to set aside the Commission's order establishing the new divisions.[11] The Northern railroads intervened as defendants and joined the United States and the Commission in defending the order. In denying Southern lines' application for interlocutory injunction, the district court dissolved a previously issued temporary restraining order and permitted the newly prescribed divisions to become applicable on April 20, 1965, subject to conditions requiring a refund of the increases to the Southern lines if they were successful in setting aside the order.

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ceive $\frac{241}{562}$ or 43% of the joint rate and the Southern road would receive $\frac{321}{562}$ or 57%.

[11] The Southern Governors' Conference and the Southeastern Association of Railroad and Utilities Commissioners intervened on behalf of the Southern carriers in the Commission proceedings and in the three-judge court judicial review action.

After oral argument, the district court concluded that the Commission's restated Rail Form A costs, although based on adjustments of territorial costs of all freight service to reflect North-South service, were not a proper yardstick for measuring the costs of the particular traffic in a divisions case. In the Court's view, the Commission was required "* * * to take affirmative action to require the development of an adequate record as to the actual costs of handling the specific traffic at issue" (A. 354). Accordingly, the district court set aside the Commission's order as not supported by substantial evidence and reasoned findings within the meaning of Sections 8(b) and 10(e) of the Administrative Procedure Act [5 U.S.C. 557(c) and 706], and remanded the case for further proceedings consistent with its opinion. Pending appeal, however, the court stayed its judgment and permitted the new divisions to remain in effect, subject to the same pay back conditions imposed in its denial of a preliminary injunction which require a financial settlement among the carriers back to the effective date of the Commission order (April 20, 1965), should its judgment be affirmed on appeal (A. 359).

SUMMARY OF ARGUMENT

I. Under Section 15(6) of the Interstate Commerce Act, Congress has imposed upon the Interstate Commerce Commission the duty to assure just, reasonable, and equitable divisions of joint rates as between connecting carriers. Exercising this authority, after consideration of evidence and upon making findings relating to each of the Section 15(6) criteria, the

Commission prescribed new divisions of the joint rates on interterritorial North-South freight traffic in proportion to the relative costs of handling that traffic. The cost figures used were derived from Rail Form A, which produces average unit costs of all territorial service, although the Commission made certain adjustments to reflect more accurately the costs of the particular traffic in question. The district court held, however, that restated Rail Form A costs were not a proper yardstick for this purpose and that the Commission was required to develop more refined data to reflect the actual costs of the particular traffic.

When contesting groups of carriers in a divisions case recognize the necessity of basing their costs of service on computations derived by applying Rail Form A territorial unit costs of all traffic to the specific work units incurred in handling the traffic involved in the contested divisions and one group sought —but failed to prove—that certain proposed adjustments were required to compensate for peculiar characteristics of the particular traffic, this Court has expressly declined to invade the province of the Commission and has approved Rail Form A computations as a proper standard of cost measurement. *Chicago & N.W. Ry. Co.* v. *Atchison, T. & S.F. Ry. Co.*, 387 U.S. 326.

Divisions cases are essentially pragmatic in nature. Congress has accorded the Commission in Section 15(6) a considerable amount of discretion to carry out its basic responsibility of prescribing "just, reasonable, and equitable" divisions. In determining

the adequacy of the cost data in the instant case, the Commission was acting in consonance with the statutory duty imposed upon it by Congress. In substituting its own view as to the adequacy of the cost evidence, the district court simply failed to give sufficient weight to the Commission's resolution of such matters, leaving little if anything to informed expertise and practical judgment. Such a result was never intended when, in Section 15(6), Congress conferred sweeping authority upon the Commission to effectuate the public interest in the existence of "divisions that colloquially may be said to be fair." *Baltimore & O. R. Co.* v. *United States*, 298 U.S. 349, 357-360.

The use of Rail Form A data is compelled as a practical matter since it is readily available and is not subject to biases which special studies conducted by the parties might understandably reflect. Moreover, it was never contemplated by Congress that costs of service in divisions cases be ascertained with exact mathematical precision—a technically impossible task since empirical judgments are essential. *New York* v. *United States*, 331 U.S. 284, 324-328. Indeed, it is rather illusory to assume that the exact costs of any particular traffic can be definitively ascertained since costs of particular shipments are necessarily an apportionment of the various expenses incurred in providing and maintaining facilities necessary to conduct rail operations generally. Where particular traffic uses physical facilities and employees' services in common with other traffic, and has been shown to have no distinguishing characteristics, the application of Rail Form A costs is plainly proper.

Nothing in the language of Section 15(6) expressly or impliedly prohibits the comparison of cost by applying Rail Form A territorial unit costs to the work units incurred in transporting a large and varied body of all traffic moving between two territories and handled by all railroads in each territory. The decision below conflicts with the established practice approved by decisions of this Court, substitutes the reviewing court's preference concerning the adequacy of cost evidence and constitutes an unwarranted incursion into the administrative domain. *S.E.C.* v. *New England Electric System*, 390 U.S. 207, 211. Since the Commission's procedures permitted all refinements to Rail Form A territorial unit costs which were necessary to reasonably reflect the cost of the particular traffic in question, the requirement of more refined cost data imposed by the court below would not only serve no useful regulatory purpose, but would seriously impair the Commission's ability to exercise in a practical manner its authority to adjust divisions.

II. The attempt of the Southern lines to rewrite the lower court's holding, so as to require rejection of the Commission's order for lack of evidence to support the use of Rail Form A costs to measure the cost items involved in their rejected adjustments, fails. Moreover, their more limited argument that the Commission's findings are inadequate and not supported by substantial evidence is itself without merit.

Southern lines were proponents of a different result from that urged by the Northern lines and had a

burden to maintain under Section 7(c) of the Administrative Procedure Act, 5 U.S.C. 556(d). As the district court acknowledged, however, the Commission in effect found that Southern lines failed to overcome Northern Lines' *prima facie* case of the applicability of Rail Form A territorial unit costs to measure North-South traffic and also to establish that their adjustments were required to compensate for the peculiar characteristics of that traffic. Thus, the Commission merely reversed their unsupported assumptions and calculations and reverted to the Rail Form A costs from which Southern lines had started. In each instance where this occurred, whether referred to by the district court as a representative example or not, the Commission's findings provided an adequate basis, supported by substantial evidence, for its prescription of the new divisions.

III. Nor do the arguments of the Southern Governors' Conference et al., intervening plaintiffs below, contain merit. Although urging that, "as a matter of law," the Northern lines cannot have an increase in divisions in the absence of findings that their higher costs result from inherent territorial disadvantages, the Commission made all the findings necessary to dispose of this claim. The bulk of the Conferences' arguments relate to the Commission's refusal to accept their unsupported and novel concept that "sectional" rather than "national" interests should control the prescription of fair divisions between the railroads. But these claims would disregard the evidence which established a need for revised divisions in order to compensate the Northern lines according to their

expenditures in the joint effort of handling North-South traffic. These arguments merely raise disagreement with judgments the Commission made, supported by evidence, on questions of transportation economics. These are not issues appropriate for judicial review and, even if they were, the Conferences have failed to show any error by the Commission that would justify the invalidation of its orders.

ARGUMENT

I.

THE DISTRICT COURT ERRED IN HOLDING THAT THE COMMISSION IS REQUIRED TO DEVELOP THE ACTUAL COSTS OF THE PARTICULAR SERVICES IN A DIVISIONS CASE AND CANNOT RELY ON RAIL FORM A TERRITORIAL AVERAGE COST COMPUTATIONS, AS ADJUSTED.

The district court held that the Commission must develop more refined data reflecting the actual costs of the particular traffic in an interterritorial divisions case and cannot accept, as a standard of measurement, computations produced through the use of Rail Form A territorial average costs, adjusted to reflect the expenses of handling the specific traffic at issue.[12] Compliance with the district court's ruling would mean that, before the Commission could determine the unlawfulness of existing divisions and prescribe new

[12] While the Commission's order was in terms ultimately set aside for lack of substantial evidence and adequate findings, the district court reached that conclusion only after rejecting the Commission's specific findings as to the adequacy of restated Rail Form A costs because these findings did not comply with the court's view of the proper standard of cost measurement to be applied (see, *e.g.*, A. 335, 349, 353).

divisions, it must develop—or have developed by the parties—special studies as to the costs of each of the services performed in handling North-South traffic. This is an impractical requirement.

Contrary to the decision below, the railroads themselves recognized the necessity for using the Rail Form A formula to measure the relative costs of North-South traffic, and they desired and expected the Commission to use that formula in ascertaining the costs of service. The only complaint was that the Commission had not made all the adjustments to the Rail Form A costs which the Southern lines had suggested. The district court's requirement of finding the exact costs of service is illusory, substitutes the court's view for that of the agency charged by Congress with the duty of prescribing fair divisions and conflicts with past decisions of this Court as well as Commission practice. The Commission plainly has the statutory authority to compute costs by adjusting and applying Rail Form A territorial unit data to the work units incurred in transporting all commodities between two territories by all railroads of these territories.

A. The Decision Of The District Court Is Contrary To Settled Commission Practice Approved Under Decisions Of This Court And Substitutes The Court's View For That Of The Expert Body Charged By Congress With Administering The Interstate Commerce Act.

The need for a comprehensive formula to measure rail costs led to the development of Rail Form A by the Commission's Cost Finding Section more than a

quarter of a century ago.[13] Data reported annually by the railroads to the Commission was first used in applying Rail Form A in *Class Rate Investigation, 1939*, 262 I.C.C. 447 (1945), affirmed, *New York* v. *United States*, 331 U.S. 284 (1947). Ever since this Court sustained the integrity of the Rail Form A formula in the *New York* case, it has been almost universally employed as an acceptable and reliable method for ascertaining relative railroad costs in every type of rate proceeding that comes before the Commission. (A. 953-957). Indeed, this Court has consistently approved the application of restated Rail Form A computations as a proper standard for measuring costs of service in divisions cases involving a large and varied body of interterritorial traffic handled by over 300 railroads, *Chicago & N.W. Ry. Co. v. Atchison, T. & S.F. Ry. Co.*, 387 U.S. 326, as well as a single commodity handled by two railroads interterritorially, *Carolina & N.W. Ry.*

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[13] Generally, under Rail Form A, the expenses of carriers assigned to geographical areas are first broken down into groups and are translated into territorial average unit costs of performing each of the kinds of service involved in moving specific shipments or in furnishing a given amount of service in each territory. Adjustments are contemplated to fit any peculiar characteristics of particular shipments for individual or groups of railroads. When the average costs for each unit of work are multiplied by the number of work units of each of the services found to be employed in moving a specific shipment or in furnishing a given amount of service, the cost figures thus produced will be the substantial equivalent of specific costs of the particular traffic in question. For a more complete description of Rail Form A and its use in developing regional cost studies, see Sen. Doc. No. 63, 78th Congress, 1st Sess.

Co. v. *United States*, 234 F. Supp. 114, affirmed, 380 U.S. 526.[14]

It has long been recognized that whether a cost study is adequate or should have been refined or supplemented by additional data is a question of fact which is within the special competence and discretion of the Commission, see *e.g.*, *Illinois Commerce Commission* v. *United States*, 292 U.S. 474, 481, 484; *Chicago & N.W. R. Co.* v. *United States*, 387 U.S. at 356. Here the contesting groups of carriers recognized the necessity for using the Rail Form A formula to measure costs of North-South service and requested that costs at the fully distributed level be utilized. The only difference between the parties involved the degree to which such territorial average costs should be modified to fit the specific traffic at issue. In rejecting seven of Southern lines' proposed twelve adjustments to Rail Form A costs, which it found were based on theoretical estimates, unsupported averages or guesses, the Commission merely reverted to the Rail Form A costs from which those railroads had started. Thus, in its determination the Commission merely adhered to the recognized practice of applying Rail Form A territorial unit costs to the work units incurred in handling particular traffic in order to produce a reasonable reflection of the expenses incurred in handling that traffic. In fact, the costing procedures used here in adjusting the South-

[14] And see *Permian Basin Area Rate Cases*, 36 L.W. 4337 at 4356, 4358 (May 1, 1968), where this Court recently sustained the Federal Power Commission's area maximum rates on gas derived from average costs, without further adjustment.

ern lines' studies are the same as those which the Commission employed with the unanimous approval of this Court just last term in *Chicago & N.W. R. Co.* v. *United States*, 387 U.S. at 351, 354, except that, in accordance with the evidence of both groups of railroads, the costs here were computed at the fully distributed level.[15]

The use of Rail Form A cost figures, in ascertaining relative costs in a large interterritorial divisions case such as this, is compelled as a practical matter. Rail Form A data is readily available[16] and does not include the biases which special cost studies conducted by the contesting parties might understandably reflect. Allocation of an appropriate part of overhead or constant cost items to the particular traffic is plainly proper,[17] and, if appropriate, Rail Form A cost

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[15] This fact is conclusively established by the *amicus* brief filed in the *Chicago & N.W. R. Co.* case by the Southern Governors' Conference and the Southeastern Association of Railroad and Utilities Commissioners, appellees here.

[16] Railroads annually report their costs to the Commission in various accounts according to the purposes for which the money was spent. The dollar expenditures in each account are separated between out-of-pocket costs and constant costs and the former is assigned to functional groupings. When the dollar figures in each account are divided by the number of service units which incurred the expense, a unit cost for each service or work unit is obtained. Unit costs multiplied by the number of service units incurred in a given body of traffic are added and result in the total dollar out-of-pocket costs for the traffic in question. If fully distributed costs are to be found, both the constant cost related and unrelated to distance are added.

[17] In *Northern Pacific R.R. Co.* v. *North Dakota*, 236 U.S. 585, 597, this Court held that when conclusions are based on

figures can be stated so as to exclude all or some constant cost items which should not be taken into account.[18] As to each cost item, however, the question is essentially one of practical and informed judgment. The Commission here found that Rail Form A costs, as adjusted, "more reliably," "accurately," and "adequately reflect the costs which are attributable to the traffic at issue," and are "particularly appropriate * * * because it is a large and varied body of traffic moving to and coming from terminals in all parts of

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cost, the entire cost must be taken into account, *i.e.*, "the outlays that exclusively pertain to a given class of traffic must be assigned to that class, and the other expenses must be fairly apportioned." And in *Baltimore & Ohio R.R. Co.* v. *United States*, 298 U.S. 349, 360, 378, this Court approved the Commission's use in a divisions case of cost and revenue evidence which reflect a due or fair proportion of the overall burden of doing business. That the language of Section 15(6)—"property held for and used in transportation"—is broad enough to support consideration of all railroad property, and thus fully distributed costs, was recognized in the *Baltimore & Ohio R.R. Co.* case, where this Court stated (298 U.S. at 360):

> It requires no discussion to demonstrate that § 15(6) authorizes the Commission to take into account and give due weight to revenues from all transportation services, the operating expenses and taxes chargeable to the same and the amounts available as compensation for the use of all carrier property. And unquestionably the paragraph also empowers the Commission to take into account the revenues, expenses, taxes and returns attributable to the services covered by the divisions under consideration.

[18] In this case there is no dispute concerning the propriety of using fully distributed costs. Their use here is questioned only in the district court's holding—in our view erroneous—that it was improper to allocate an appropriate part of suburban passenger deficits to the costs of North-South traffic, see *infra*, pp. 40-45.

both territories" (A. 48-50, 77-78, 120-121). Yet, the district court overturned these Commission findings and held that the cost evidence was not adequate since, in its view, more refined data reflecting actual costs was required.

While the district court was quite correct in stating that the Commission prescribed new divisions on the basis of the relative costs of handling North-South traffic, that hardly leads to the conclusion that the restated Rail Form A data used by the Commission was inadequate.[19] Here the Commission ascertained the relative costs of service by applying, with certain adjustments, Rail Form A fully distributed unit costs to each of the work units used in moving North-South traffic which were shown in Southern lines' traffic study of all such traffic moving in one year. What the Southern roads complained about—and persuaded the district court to accept—was that the Commission had not made additional adjustments to the cost data which they had suggested. (A. 343-344). In holding that the Commission violated its statutory duty in

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[19] Aside from the district court's substantial inaccuracy in defining the purpose of Rail Form A and its application here (A. 348-349), the court appears to hold as a matter of law that the Commission cannot apply Rail Form A costs to North-South traffic in reaching its determination "without further evidence." Since the court disregarded that particular evidence (*infra.* p. 35 *et seq.*) its holding erroneously condemns the use of Rail Form A as a standard of measurement of costs of service. Moreover, the goal in a divisions case is not slavish adherence to any particular exactitude, but rather a method of computation which takes into account the direct and, where appropriate, the indirect expenses and projects a reliable and reasonably accurate estimate of the cost of providing the particular service.

failing to take affirmative action to require the development of an adequate record as to the actual costs of handling the specific traffic at issue, the district court seriously misconceived not only the Commission's function under Section 15(6), but also its own function as a reviewing court. See *United States* v. *Pierce Auto Freight Lines*, 327 U.S. 515, 535-536; *S.E.C.* v. *New England Electric System*, 390 U.S. 207, 211.

Assessing the fairness of existing divisions and prescribing new divisions are matters which are essentially pragmatic in nature. Divisions proceedings cannot be governed by mathematical niceties since the pertinent considerations are at best inexact and imprecise. Congress plainly recognized this in enacting Section 15(6), and has implicitly approved the way the Commission has administered its authority under the statute by leaving it unchanged since 1920. As succinctly stated by this Court in *Baltimore & Ohio R. Co.* v. *United States*, 298 U.S. 349, 357, the purpose of these provisions "is to empower and require the Commission to make divisions that colloquially may be said to be fair." Continuing, this Court stated (*ibid.* at 359):

> The Commission alone is authorized to decide upon weight of evidence or significance of facts. There is no single test by which "just," "reasonable" or "equitable" divisions may be ascertained; no fact or group of facts may be used generally as a measure by which to determine what division will conform to these standards. Considerations that reasonably guide to decision in one case may rightly be deemed to have little

> or no bearing in other cases. Error as to the weight to be given financial needs, operating costs or other material facts is not a misconstruction of the Act.

In carrying out its powers under Section 15(6), the Commission is charged with giving "due consideration, among other things," to various factors there spelled out. And these factors are to be considered only "among other things," and along with "any other fact or circumstance which would ordinarily without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier * * *."

No one can dispute that, in enacting Section 15(6) with such sweeping authority, Congress never intended for the Commission simply to perform essentially ministerial tasks in determining how joint freight rates should be divided,[20] whether its determination is grounded on a comparison of costs of service or a consideration of other factors as well. See *Boston & Maine R.R.* v. *United States*, 208 F. Supp. 661, 675 (D. Mass., affirmed, 371 U.S. 26. Rather, the plain duty of the Commission is to effectuate "the public interest in maintaining all essential parts of the transportation system" (325 I.C.C. at 49). See *New England Divisions Case*, 261 U.S. 184, 191. Here, in rejecting Northern lines' claim that they were entitled to an adjustment in their divisions over and above

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[20] As stated by this Court in *Interstate Commerce Commission* v. *Hoboken R. Co.*, 320 U.S. 368, 381: "* * * [T]he question as to what is a proper division is one for the Commission's discretion, reviewable only for unreasonableness, departure from statutory standards, or lack of evidentiary support."

their relative costs of service because "their revenue needs are greater since the Southern lines' average rates of return are somewhat higher," the Commission specifically pointed out that its "prescription of divisions based on relative costs includes allowances for overhead and return, and in our judgment reflects a due proportion of the burden of maintaining the financial integrity and credit of the carriers involved" (A. 79). Thus, in determining the adequacy of the cost data and the propriety of using adjusted fully distributed costs, the Commission was acting in consonance with the statutory duty imposed upon it by Congress. The significance of that Congressional authorization, and the wide latitude of discretion which necessarily accompanies it, was disregarded by the district court in substituting its judgment for that of the Commission with regard to the sufficiency of the cost evidence on which its determination was based.

Nor is the district court's or railroad appellees' suggested distinction of this Court's decision last term in the *Chicago & N.W. Ry. Co.* case, *supra*, apposite (A. 349-350; Motion to Affirm, p. 13). There, although the lower court had not dealt directly with the cost issues, this Court found that "attacks on the legal validity of the Commission's findings on costs * * * so insubstantial that no useful purpose would be served by furthering proceedings * * *" (*ibid.* at 356). In the instant case, as in *Chicago & N.W. Ry. Co.*, "[t]he presentation and discussion of evidence on cost issues constituted a dominant part of the lengthy administrative hearings, and the issues were thoroughly explored and contested before the Commission.

Its factual findings and treatment of accounting problems concerned matters relating entirely to the special and complex peculiarities of the railroad industry" (*ibid.*). Here, as there, the basic cost study upon which the Commission and all parties relied was Rail Form A territorial averages, with certain proposed adjustments allowed and others rejected.[21] And finally, here, as there, "the Commission's disposition of these matters is sufficient to show that its conclusion had reasoned foundation and were within the area of its expert judgment" (*ibid.*). (See *infra*, pp. 38-47). In the instant case, the district court simply failed to give sufficient weight to the Commission's resolution of such matters and "indulged in an unwarranted incursion into the administrative domain." *S.E.C.* v. *New England Elec. System, supra*, at 211.

In our view, costs of service in divisions cases can not be ascertained with exact mathematical precision —a result which is, of course, technically impossible since empirical judgments are essential, particularly as to the distribution of overhead. *New York* v. *United States*, 331 U.S. 284 at 335; *Baltimore & Ohio R.R. Co.* v. *United States*, 298 U.S. 349 at 378. Indeed, it is rather illusory to assume that the exact costs allocable to specific traffic can be definitively as-

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[21] Thus, the district court is simply wrong in construing the *Chicago & N.W. R. Co.* case as involving Rail Form A costs only to the extent of three adjustments. Indeed, in basing their studies on Rail Form A data here, Southern lines used unadjusted Rail Form A territorial average costs for 89.45% of the total North-South costs which they attributed to the traffic in question. (See A. 867-876, 877-880, percentage computed).

certained. In point of fact, any shipment's actual cost is necessarily an apportionment of the various expenses incurred in providing and maintaining facilities and in conducting rail operations generally. Thus, there is no such thing as a particular, specific or "actual" cost for handling North-South traffic as distinguished from other traffic because North-South traffic uses physical facilities and employee services in common with other traffic. The costs of the facilities and employee services must be apportioned to each traffic on the basis of the amount of service, *i.e.*, work units, incurred by each. For example, a car of North-South traffic moves in a train with cars of other traffic. Every car in the train is allocated a part of the costs of locomotive maintenance, fuel, train crew costs, etc. The basic unit of apportionment, a gross-ton mile, is the same for every car and ton in the train. There is no reason to assign to a car or ton of North-South traffic a proportion of train running expense which is larger, smaller, or different than to a car or ton of other traffic. This principle of allocating costs on the basis of work units incurred applies to the maintenance expense of the track and roadway over which the traffic moves, the switching expense it incurs, and all other costs.

Finally, judicial and administrative construction and application of Section 15(6) aside, the one thing that is perfectly clear is that the statute does not prohibit the Commission's comparison of costs of service by applying Rail Form A territorial unit data to the specific services in question. A study of the language of Section 15(6) discloses no express or im-

plied suggestion that the criteria for measuring the justness of divisions of joint rates is limited in any way. On the contrary, it specifies that the Commission shall give "due consideration" to any relevant fact or circumstance in the prescription of fair and equitable divisions.

In sum, the district court's holding that restated Rail Form A cost figures were improperly utilized by the Commission is erroneous, conflicts with established practice under decisions of this Court and substitutes the court's own view concerning the adequacy of the cost evidence for that of the agency charged by Congress with the duty of prescribing fair divisions. The Commission plainly has the statutory authority to compute costs of service by applying Rail Form A territorial unit data to the work units incurred in transporting a large and varied body of traffic between two broad territories in a case involving all commodities and all the railroads of each territory. We submit, Section 15(6) must be read as authorizing the Commission to utilize such an approach. This view is confirmed by the fact that the consistent judicial and administrative interpretation of the statute has never been repudiated by the legislative branch even with the slightest modification since Rail Form A was reported to it in 1943—over 25 years ago (see Sen. Doc. 63, 78th Cong., 1st Sess.).

B. Requiring The Development Of Exact Costs Is Illusory And Would Serve No Significant Regulatory Purpose.

As the prior discussion shows, costs of service in divisions cases can not be ascertained with exactitude.

In addition, it is equally as clear that the more refined data required by the district court would have only limited utility.

On the basis of such refined data the Commission could decide that Rail Form A computations are not adequate to measure the costs of handling North-South traffic because the characteristics of the services performed in handling that traffic are so different from average traffic as to require special study and treatment. (*Cf.*, *Boston & M. R.R. Co.* v. *United States*, 208 F. Supp. at 674-5 (D.C. Mass.), affirmed, 371 U.S. 26). But this possibility was provided for by Commission procedure, the parties introduced evidence along these lines, and the contrary was shown. And despite the Southern lines' assertion that Northern lines failed to produce the necessary evidence in their sole possession in order to resolve the issue as to whether Rail Form A territorial average costs required adjustments to reflect the costs of North-South traffic (see A. 336), the Commission in effect concluded—as the district court acknowledged—that "the Northern lines established a prima facie case that Rail Form A costs properly measure the cost of the specific traffic" (A. 343), and that the Southern roads had not overcome this *prima facie* case insofar as their suggested but rejected adjustments were concerned.

A second possible use for the refined data envisioned by the district court would be to demonstrate that the Rail Form A territorial data with respect to individual services was so extreme as to distort the costs of handling North-South traffic. Here again, however,

the Commission allowed for such a showing. The Southern lines proposed some twelve adjustments for specific services. The Commission considered these adjustments, accepted five [22] and rejected seven [23] as unsound in concept or based on unsupported opinions and inapplicable facts or assumptions.[24] With regard to these questions of fact, it is well settled that the Commission is not required to give conclusive weight to unsupported opinion evidence of Southern lines' witnesses. See *Baltimore & Ohio R.R. Co.* v. *United States*, 298 U.S. at 378, 379; and *Loving* v. *United*

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[22] Accepted were adjustments concerning (1) way and through train separation (A. 87); (2) platform costs (A. 87-89); (3) switching and terminal companies (A. 89-91); (4) short lines (A. 110-113); and (5) train tonnage (A. 121-122).

[23] Rejected were adjustments concerning (1) count of cars interchanged, originated, and terminated (A. 91-94); (2) car costs (A. 94-101); (3) freight car empty return ratios (A. 101-110); (4) switching costs to eliminate the effect of volume switching at origin and destination (A. 113-121); (5) constant costs of suburban passenger service deficits (A. 122-124); (6) constant costs on transit commodities (A. 124-128); and (7) equalization of gateway interchanges (A. 128-129).

[24] In support of the ruling that the Commission violated its duty to develop a more adequate record, the district court appears to rely on the fact that "in several instances [the Commission] held that the absence of comparable evidence in the record itself prevented adjustments in territorial averages," citing several instances (A. 344). The Court misread the findings made since in each instance the cited adjustments were rejected primarily for lack of merit or support in evidence. Lack of comparable evidence, in some cases, was merely an additional reason for the Commission's rejection of Southern lines' proposed adjustments (A. 94; 108; 110; 121).

States, 32 F. Supp. 464 at 467 and cases cited (W.D. Okla.), affirmed, 310 U.S. 609.

As a theoretical matter, the only new purpose to be served by refined cost data would be to challenge the propriety of using Rail Form A costs either to require more accuracy or to restrict consideration to only those costs directly pertaining to the traffic in question. Such an effort to achieve a theoretically perfect formula for ascertaining relative costs of particular traffic without appropriate allowances for overhead and return on investment conflicts with the broad purposes underlying Section 15(6)—even in a case such as this where relative costs of service was the criterion on which the adjustment in the divisions was grounded.

Here the Commission concluded that, as restated with appropriate adjustments, the Rail Form A cost data submitted was of such quality, credibility and accuracy that it could be accepted as adequately reflecting the costs of handling the particular North-South traffic at issue. In view of this conclusion, there was no need for the Commission to have embarked upon an independent investigation to determine whether the parties might be overlooking or concealing some relevant evidence or whether special studies would produce more refined, significant data beyond that already introduced by the parties for and against the proposed adjustments to Rail Form A computations. See *Chicago & N.W. Ry. Co.* v. *Atchison, T. & S.F. Ry. Co.*, 387 U.S. at 343.

Indeed, since the particular carriers involved are obviously in the best position to know if there are

any peculiar characteristics of their traffic which may differ from average traffic, it seems quite fair and reasonable—and wholly consistent with Section 15(6) and this Court's decisions thereunder—to require such carriers to come forward and point out to the Commission the peculiar characteristics which they believe require special treatment. It is difficult to see how the Commission can be expected to know, as an initial matter, whether such peculiar characteristics may exist or whether any "special studies" may be needed. If the Commission, in order to comply with the district court's decision, were to be required to conduct special studies to determine the unit costs of every work unit of the services performed in every case, the administrative proceeding would be virtually interminable. And the results of such an unduly burdensome approach, even if practicable, would be of little, if any, utility in the absence of special circumstances.[25]

In the final analysis, no significant regulatory purposes would be served by the district court's requirement of developing more refined costs.[26] In addition,

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[25] Moreover, here Southern lines acted throughout the Commission proceeding on the basis of Rail Form A average costs, with suggested adjustments. After the Commission rendered its decision rejecting certain of their proposed adjustments, Southern lines urged that more refined "actual costs" were required. Having voluntarily employed Rail Form A costs, and having failed to justify their proposed adjustments or to overcome their opponents' *prima facie* case that North-South traffic is average traffic, Southern lines should be bound by the findings grounded on the evidence introduced.

[26] In the *Chicago & N.W. Ry. Co.* case, the Commission found significant the smallness of the percentage-point differ-

and perhaps more importantly, the purpose of Congress in conferring authority upon the Commission to adjust divisions fairly might well be effectively frustrated by such a requirement.[27]

II.

SOUTHERN RAILROADS' MORE LIMITED ARGUMENT, AS TO THE REFINEMENT OF COSTS REQUIRED UNDER THE DECISION BELOW, IS WITHOUT MERIT.

In their Motion to Affirm, Southern lines attempted to justify, on a more limited ground, the district court's novel requirement that the Commission cannot

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ence between two cost showings—one based on a study made in great detail of the particular service rendered, and the other involving a straight Rail Form A application. It concluded that "one substantiates the other, and supports the view that, for a large and varied body of traffic as here at issue, territorial average costs will be the substantial equivalent of specific costs" (A. 78-80). In this case, a similar comparison of two such studies establishes that the percentage-point difference is almost infinitesimal (A. 48-50).

[27] While the district court's ruling refers to "a divisions case" (A. 348), the principle announced is broad and necessarily raises doubt as to the validity of cost formulas similar to Rail Form A, such as Highway Form B and Barge Form C, which have been developed for determining the relative costs of service of the several kinds of carriers subject to its regulation. It is essential that the Commission be able to ascertain relative rail costs on the Rail Form A basis and make adjustments when necessary. As this Court said in another context concerning the necessity to proceed on a group basis in the *New England Divisions Case:* "[o]bviously, Congress intended that a method should be pursued by which the [Commission's] task * * * could be performed." (261 U.S. at 197).

use Rail Form A data as a standard of cost measurement without taking affirmative action to have developed more refined data reflecting the "actual" costs of handling North-South traffic. Apparently, it is now their position that the district court merely rejected the Commission's order for lack of evidence to support the use of restated Rail Form A costs in specific instances corresponding to their suggested but rejected adjustments.[28] (Motion to Affirm, pp. 9-11). They asserted that nothing in the decision below casts doubt on the integrity of Rail Form A or precludes the Commission from relying on Rail Form A costs as appropriately adjusted since "no party here contends that Rail Form A cannot provide the framework for analysis" if supported by evidence. (*Ibid.*, pp. 7 and 13.) The district court, however, reached the very conclusion urged upon it by the Southern lines.[29] (See A. 354). Thus, although having urged the district court to hold the Commission's order invalid because of failure to develop more refined data reflecting "actual" costs of the traffic at issue, Southern lines appear to now maintain that the Commission's order is invalid because there is no evidence "to support the use of unadjusted average Rail Form A costs to measure

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[28] Such as car costs, the cost of commuter operations, the ratio of empty-to-loaded cars, the costs of interchange and switching the cars.

[29] In requested conclusion of law numbered 5, they asked the lower court to hold that the Commission violated its statutory duty in failing "to take affirmative action to require the development of an adequate record as to the actual costs of handling the North-South traffic at issue."

the critical cost factors" urged in their adjustments. But this narrower contention will not withstand analysis.

As previously indicated, the sharp dispute as to the proper method of ascertaining costs of service concerned only "the degree to which Rail Form A territorial average costs should be modified to fit the specific traffic at issue" (A. 47). The Northern lines relied principally on standard Rail Form A computations since the traffic covered almost all commodities moving over all railroads and between all stations in both Official and Southern territories.[30] They introduced evidence which established the *prima facie* validity of using Rail Form A costs to measure the relative costs of North-South traffic. Train tracing and train utilization studies provided a documented and detailed demonstration that North-South traffic is not handled as a distinct entity, but is rather average traffic handled as an indiscriminate part of all traffic and possesses no distinguishable transportation characteristics. (A. 575-576 and 541-582).[31]

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[30] For the year 1956, North-South traffic produced revenues which constituted 6% and 21.4% of the total freight revenues of the Northern lines and the Southern lines, respectively (A. 796), which combined represents 10% of the combined revenues of both lines. Compare *New York* v. *United States*, 331 U.S. at 330 and 343 in which this Court approved the use of Rail Form A costs where the class rate traffic involved constituted only a small percentage (4.1%) of the total traffic of the railroads.

[31] The train utilization studies showed how railroad facilities and services are planned and operated so as to transport all freight similarly and demonstrated the extent to which the total train service of the Northern lines was used in mov-

The Southern lines, contending that Rail Form A average costs of all traffic was not a proper yardstick for measuring North-South traffic, presented downward adjustments to reflect alleged particular characteristics of that traffic. (A. 40 and 50). In urging these adjustments in order to gain increases in their divisions based on costs as well as revenue needs, the Southern lines were themselves proponents of a different result from that urged by the Northern lines and, therefore, had a burden to maintain under Section 7(c) of the Administrative Procedure Act, 5 U.S.C. 556(d).[32] (A. 77-78). However, the Northern lines responded with evidence establishing the invalidity of each proposed adjustment and the propriety for using Rail Form A costs. (See, *e.g.*, A. 893-905, 911-931, 933-974). After carefully considering this evidence in 9 pages of its report and 26 pages of an appendix, the Commission found that "the cost computation of each side furnished substan-

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ing the traffic in question. (A. 544-547, 577-582). It showed, among other things, that in a test week in May of 1959, North-South traffic moved in 45% of all trains operated and, therefore, encountered all operating conditions and transportation burdens incurred on general traffic. (A. 547).

[32] The requirement of Section 7(c) that "the proponent of a rule or order shall have the burden of proof" was explained in the Attorney General's Manual on the Administrative Procedure Act, 1947, at page 75, by referring to Sen. Rep. p. 22 (Sen. Doc. p. 270) and H.R. Rep. p. 36 (Sen. Doc. p. 270), as meaning "not only that the party initiating the proceeding has the general burden of coming forward with a *prima facie* case but that other parties, who are proponents of some different result, also for that purpose have a burden to maintain."

tial verification for that of the other side." It then concluded that, apart from the rejected adjustments, "our restatement * * * based on the Southern lines' cost computation, as applied to their traffic studies, * * * more reliably and accurately reflect[s] the movement of the traffic in question" (A. 48). Thus, on the basis of the evidence submitted by the Northern lines and verified by the Southern lines' own presentation, there is substantial evidence to support the Commission's conclusion that restated Rail Form A costs properly measure the costs of North-South traffic.

Although acknowledging the Commission's conclusion, the district court referred to three cost items [33] as "important separate issues" of "greater significance as illustrations of the more pervasive error" of the Commission in using unadjusted Rail Form A costs and held that the Commission's cost computations were not supported by reasoned findings and substantial evidence. In this respect the district court erred. The Commission made clear and concise findings that Southern lines' proposed adjustments were unjustified and that Rail Form A provided the best method of associating expenses with the services performed in moving the traffic at issue. A discussion of the cost items cited by the district court illustrates this fact.

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[33] Solely related costs of suburban passenger service, switching costs and empty return ratios of box cars.

A. Empty-Return Ratios Of Box Cars

The Commission substituted Rail Form A empty return ratios for that devised by the Southern lines.[34] These ratios were derived from a seven-day study based upon supervised data spaced throughout a year that all railroads are required to furnish by order of the Commission.[35] It produced ratios of 39% in the North and 33% in the South. The Southern lines proposed to reduce these ratios to 30% in three steps covering the alleged effect of special device cars, Canadian traffic and a judgment factor. The Commission discussed and rejected the adjustments by finding that the first step is "not adequately supported; at best, it is merely illustrative;" that the second step "is in error;" and that the third step "is purely an unsupported assumption." (A. 107-108). The Commission then concluded that:

> "the empty ratios for both boxcars and refrigerator cars developed by the special studies of the Southern lines are not as sound an estimate of the empty return incurred by the Official-Southern traffic as are the 7-day study territorial empty return ratios. The latter reflect the compilation of actual data reported by the railroads on a comparable basis in each territory under an order of this Commission." (A. 110).

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[34] The district court rejected the Commission's findings by referring only to the single dissent in the proceedings stating that "the nature of this problem is summarized" there. This hardly constitutes a review of the reasons expressed by the Commission or the rationale supporting its conclusion. (A. 346).

[35] This data covered all types of cars, including auto parts' cars.

B. Switching Costs

The Commission disagreed with the Southern lines' treatment of switching costs which proposed to eliminate the effect of volume switching at origin and destination. The Southern lines urged that their Rail Form A territorial average switching costs were depressed by the large proportion of volume movements of certain commodities in their territory to the point that those costs were not representative of North-South traffic which includes only a small amount of such commodities. Their cost study used origin and destination switching costs based on a special study of only 41 out of 967,554 cars in the South. Here again, in rejecting Southern lines' adjustment, the Commission found that (A. 121):

> Territorial average costs are particularly appropriate to the traffic in this case because it is a large and varied body of traffic moving to and coming from terminals in all parts of both territories. In our opinion, and we so find, the depressing effect, if any, of volume switching commodities on the average would affect both territories and, for purposes of comparison, would be largely offsetting.
>
> The switching studies in the South have weaknesses, both in the sample and in the studies themselves. The adjustment in the North was not made on a basis comparable to that in the South, and here, where the relationship of North and South is of prime importance, this is a major defect.
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> For these reasons, we conclude that the contentions of the northern lines are of merit and

that Rail Form A territorial average switching costs more accurately measure the relative switching costs on each side of the border of the official-Southern traffic than the switching costs computed by the southern lines.

C. Solely Related Costs Of Suburban Passenger Service.

The Commission rejected Southern lines' adjustment for allocating passenger service deficits to constant costs. While the Northern lines initially sought to exclude the entire amount of both Northern and Southern lines' passenger deficits, the Southern lines supported inclusion of such deficits in the cost figures to be used in assaying the propriety of existing, and in prescribing new, divisions. However, they sought to have the Commission draw a distinction between intercity and suburban passenger deficits, since it was desirable, from their point of view, to have the intercity deficits of the Southern roads included.[36] Inclusion of intercity deficits was urged for the reason that such deficits are allegedly almost entirely attributable to the apportioned costs of common facilities which must be incurred to provide freight service. Exclusion of suburban deficits was urged because suburban service facilities are allegedly separate and not used in common with freight or intercity passenger service and could be eliminated by discontinuance of suburban service. The Commission, however, found such a

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[36] In the context of this case, Southern lines' overall passenger deficits are relatively greater than those of the Northern lines (A. 958-961, 975-977, and 978-979).

distinction unjustifiable. After referring to Southern lines' single example of solely related expenses of certain separate suburban track facilities and noting that other costs relating to roadway and terminals would continue, the Commission found that "although many items of suburban service can be considered solely related, the facilities and service as a whole cannot be considered solely related * * * and treated entirely apart from freight service and intercity passenger service" (A. 124). The Commission then went on to conclude that (*ibid.*):

> "* * * Because the suburban service deficit includes common costs which must be incurred to provide freight service or intercity passenger service, such costs are properly chargeable to those services to the extent they cannot be recovered from suburban operations, and the deficit from suburban operations should not be excluded from the constant costs. * * *"

Thus, after making the basic determination that passenger deficits should be included in the fully distributed costs, the Commission apportioned a share of the entire Northern and Southern lines' passenger deficits to the costs of handling North-South traffic, in the same proportion that the particular traffic bears to the total traffic of each territory.

While the district court acknowledged that the Commission found the distinction between intercity and suburban deficits unjustifiable, it nevertheless overturned the Commission on this question since it viewed intercity deficits as sufficiently related to the

common facilities which must be maintained to provide freight service. However, ignoring the Commission's express findings to the contrary, the district court chose to regard suburban deficits quite differently. In rejecting the Commission's rationale and findings, the district court stated flatly that the Administrative Procedure Act requires a determination and findings on "the critical issue * * * [of] how much of the railroads' cost of commuter service was in fact common with the cost of freight service and how much was solely related to commuter service" (A. 345). It concluded that the Commission failed to make adequate findings in this regard (A. 346). In substituting its own view as to what passenger deficits may appropriately be included in constant costs, the district court once again misconceived its function of judicial review, and departed from prior Commission practice approved by the Court. See *Consolo* v. *Federal Maritime Commission*, 383 U.S. 607, 618-619; *Illinois Central R. Co.* v. *Norfolk & W. Ry. Co.*, 385 U.S. 57, 66, 69.

The Commission's approach in apportioning all passenger deficits to the costs of freight service in a divisions case is consistent with established practice, specifically approved by this Court, of fixing freight rates on the basis of including passenger deficits as a part of freight service costs. In *King* v. *United States*, 344 U.S. 254, 261, 264, 267, most of the principal Southern railroads sought and were granted an increase in the Florida intrastate freight rates on the ground that they discriminated against interstate commerce. The policy reasons for taking passenger deficits into account in adjusting freight rates were

expressed in the Commission's report.[37] In sustaining the order without regard to whether the costs were common or solely related, this Court concluded that (*ibid.* at 267) "there is no reason why the Commission may not give weight to passenger deficits in prescribing the intrastate freight rates in Florida, as it does in prescribing interstate freight rates for the Southern Territory."[38] Here, the passenger deficits were unquestionably included in fixing the level of, and in granting general increases in, the joint freight rates on North-South traffic.[39] Thus, the Commission was merely dividing the joint rates in conformity with the factors which went into their composition and the consistent administrative practice approved by this Court.

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[37] *Increased Freight Rates, 1948*, 276 I.C.C. 9 at 35:

> "* * * if passenger service inevitably and inescapably cannot bear its direct costs and its share of joint or indirect costs, we have felt compelled in a general rate case to take the passenger deficit into account in adjustment of freight rates and charges. Both the freight and passenger services are essential, and revenue losses or deficits on the one necessarily must be compensated by earnings on the other if the carriers are to continue operations."

[38] *Accord: Chicago, M., St. P. & P. R.R. Co.* v. *Illinois*, 355 U.S. 300, 307; *Public Service Comm'n of Utah* v. *United States*, 356 U.S. 421, 426.

[39] See *Increased Freight Rates, 1948*, 276 I.C.C. 9, 32-39; *Increased Freight Rates E. W. & S. Territories, 1956*, 300 I.C.C. 633, 641-647, 657-658; *Railroad Passenger Train Deficit*, 306 I.C.C. 417, 477-479; and S. Rep. No. 445, 87th Cong., 1st Sess., p. 285.

Indeed, the allocation of passenger deficits to the costs of freight service in a divisions case is rational and compelled as a practical matter. Both intercity and suburban passenger services have some solely related and some common costs and are, therefore, both similar in character. A meaningful comparison of the relationship of fully distributed costs can only be made on the basis of including all passenger deficits.[40] These deficits are incurred and represent money lost to the railroads by reason of the fact that the Interstate Commerce Act requires the continued rendition of necessary passenger services.[41] Such losses must be recovered from railroad freight operations if railroads are to remain solvent.

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[40] At several places in its opinion, the district court referred to the fact that the Commission itself had noted that some costs of providing suburban service could be considered as solely related to that service (A. 344-345, 355). In light of what it erroneously regarded as "a concession that many commuter facilities are solely related to that service and have nothing whatsoever to do with the cost of handling the North-South traffic or any other freight traffic" (A. 345), the court found the Commission's treatment of suburban deficits inconsistent and unsupportable. The fact that some costs of providing suburban service might be considered as solely related, however, hardly leads to the conclusion that all such costs can or should be so regarded or that the Commission acted improperly or contrary to law in not excluding some of these costs here. Many costs of intercity passenger service are also solely related thereto, such as, among others, stations, cars and train operation, and the Commission included these.

[41] Thus far Congress has refused to permit wholesale abandonment, discontinuance or deregulation of essential passenger services, or to require subsidization of such services. See *Alabama Comm'n* v. *Southern Ry.*, 341 U.S. 341.

As discussed, *supra* pp. 40-42, the Commission made findings plainly explaining its reasons for treating an appropriate part of the suburban passenger deficits as a cost of North-South service. The law requires no more. *Minneapolis & St. Louis Ry. Co.* v. *United States*, 361 U.S. 173, 236. And contrary to the district court's view concerning the applicability of this Court's comments in the *Chicago and N.W. R. Co.* case, *supra*, (A. 345-346), this is not a case where the Commission has given controlling weight to passenger deficits and has required carriers in one part of the country to subsidize passenger operations elsewhere. It was upon Southern lines' insistence that the Commission included passenger deficits within fully distributed costs. However, as to anything beyond the inclusion of a proportionate part of passenger deficits as the constant or overhead costs of North-South freight service, the Commission specifically found (A. 79), that nothing "presented here offers a concrete basis on which to find that either group is entitled to a share of the joint rates larger than accruing under the divisions hereinafter prescribed on the basis of relative costs [which] includes allowances for overhead and return, and in our judgment reflects a due proportion of the burden of maintaining the financial integrity and credit of the carriers involved."

Finally, in the preceding discussion we have considered those aspects of the district court's holding which we regard as significantly in error and have dealt with the court's particularized challenges to the

adequacy of the Commission's findings.[42] Although referred to by the district court as illustrations of the Commission's basic error, we submit that, under a proper view of Section 15(6), the Commission's cost findings provided an adequate basis for its prescription of new divisions.[43] A fair reading of the district

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[42] In a concluding paragraph of its opinion, the district court also stated that the cost data used by the Commission, in addition to the other infirmities which it had found, "[w]ith the passage of each year * * * becomes more and more vulnerable to the charge of staleness," so that a reopening of the proceeding by the Commission to obtain more current data "well might be warranted" (B&O J.S. App. 32a). Considering the time-consuming and complex nature of interterritorial divisions case such as this one, however, the court's suggestion in this regard might result in the Commission's never being able to decide such cases on the basis of sufficiently recent data—thus negating its authority under Section 15(6). *Cf., Baltimore & O. R. Co.* v. *United States,* 298 U.S. 349, 389 (concurring opinion by Mr. Justice Brandeis); and *Interstate Commerce Commission* v. *Jersey City,* 322 U.S. 503, 514-515, 517-518.

[43] With respect to each of the remaining four proposed adjustments of the Southern lines, the Commission's findings, supported by the evidence, adequately expressed its reasons for relying on Rail Form A data.

(1) Gateway Interchange Costs: Southern lines averaged Rail Form A interchange costs in the North and the South and multiplied the difference between the average and Rail Form A figures by the number of cars involved which produced an overstatement in the North and a corresponding understatement in the South of $797,043. Southern lines attempted to justify this adjustment equalizing interchange costs by referring to certain gateways where engine times were equalized and others where equal charges are made under joint facility arrangements. Finding several weaknesses in Southern lines' adjustment, the Commission rejected it (A. 128-129).

(2) Car Costs: Southern lines sought to substitute aver-

court's opinion shows that nothing short of special studies of each work unit of North-South service would, in its view, have sufficed. In their attempt to rewrite that holding, therefore, the Southern lines must fail. And, as shown, *supra*, pp. 35-46, even as to their more limited claim concerning the lack of rea-

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age car costs for the entire United States in lieu of Rail Form A territorial averages for each group of carriers. Based upon Northern lines' evidence rebutting Southern lines' justification for their adjustment and firmly establishing that Rail Form A costs properly reflected the costs of handling North-South traffic, the Commission rejected the Southern lines' supposititious car costs because "[t]he use of a national average car cost conceals territorial differences in cost which are important in the consideration of divisions between the two involved territories" (A. 101).

(3) Count of Cars Interchanged: Southern lines proposed that all cars transferred between rail and water carriers at ports be considered as originated or terminated rather than some cars being so considered and others as being interchanged. The Commission rejected this proposed adjustment because it was wrong in theory and not supported by adequate underlying data. (A. 94).

(4) Constant Cost on Transit Commodities: A transit commodity is one moving under a single published rate which provides for some kind of storage or processing in transit and covers the movement of the raw material into and the movement of the finished product beyond the transit or processing point. Although pulpwood and wet phophate rock are not single rate transit commodities, Southern lines claimed a tacit transit arrangement existed which would use the rails on movement of the finished product; and, therefore, that portion of constant costs assigned on a ton and ton mile basis to the raw materials which was not recovered from the revenue received should be added to the cost of moving the finished products. The Commission rejected this adjustment by finding that it was "not well founded" to "transfer to interterritorial traffic * * * a part of the constant costs which had been assigned to intraterritorial traffic." (A. 127-128).

soned Commission findings supported by substantial evidence, their argument is without merit. Cost accounting, to be sure, is not an exact science. Here it was not inexpertly done, yet the district court, although lacking the power, substituted its own fact appraisal for that of the Commission. See *Carolina & N.W. Ry. Co.* v. *United States*, 234 F. Supp. 112, 114 (W.D. N.C. 1964), affirmed, 380 U.S. 526. In the *Carolina & N.W.* case, as here, "[w]ith much ingenuity, counsel for Southern has attempted to find questions of law where there are none." And here, as there, this Court should conclude that "[t]he Commission has acted neither capriciously nor arbitrarily, nor has it misinterpreted or misapplied the law."

III.

THE ARGUMENTS OF THE SOUTHERN GOVERNORS' CONFERENCE, ET AL., AS TO THE INVALIDITY OF THE COMMISSION'S ORDER UNDER THE DECISION BELOW, ARE WITHOUT MERIT.

In their Motion to Affirm, the Southern Governors' Conference and the Southeastern Association of Railroad and Utilities Commissioners [44] trace the untenable cost arguments advanced by the Southern railroads although they submitted no cost evidence of their own. The Conferences, however, tend to emphasize their separate and "most important" claim that, even if the Northern lines experience higher costs of service, the Commission must find that such higher costs reflect inherent territorial disadvantages before giv-

[44] Hereinafter referred to as the "Conferences".

ing effect to them in an interterritorial divisions case —otherwise equal factor divisions must be maintained. (Motion to Affirm, pp. 6, 24-26). Their contention rests upon the premise that the Commission made no adequate findings and, therefore, its order would effectively nullify the economic gains realized by the South as a result of *New York* v. *United States*, 331 U.S. 284. The infirmity in this argument lies in the fact that *New York* v. *United States, supra*, is not pertinent to the point they attempt to make.

In the *New York* case, the Commission, acting under Section 3(1), prescribed a uniformity of *class rate* structures between all territories east of the Rocky Mountains in order to eliminate unduly discriminatory rates which were not justified by differences in costs or transportation conditions. Here the reasonableness of the rates was not in issue and the Commission was merely dividing the revenues paid by the shippers in order to provide the carriers with compensation fairly proportionate to the amount and character of the services which they perform. Changes in divisions are essentially matters between the participating carriers and do not affect the rates in any manner. More significantly, the statutory criteria for removing an undue discrimination in rates under Section 3(1) are not the same as adjusting inequitable divisions under Section 15(6); and no judicial construction of Section 15(6) imposes a restriction upon the Commission's use of relative costs in only those cases where inherent territorial disadvantages exist. Moreover, the dire consequences which the Confer-

ences profess to see in the Commission's treatment of the issues in this case are simply not present.[45]

Nevertheless, the Conferences urge that the Commission erred in failing to make adequate findings disposing of their contentions. We submit that the Commission's reports affirmatively show that there is nothing ambiguous or vague about the Commission's findings rejecting their claim.

With respect to the Conferences' argument that there was a failure "to give effect to the overriding demands of the public interest which, they say, require uniformity in these divisions," the Commission found (A. 50-51):

> * * * We recognize that the public interest must be considered and the importance to the public of the transportation services of the railroads is not a sectional concept. We are required under the [Interstate Commerce] Act to preserve an adequate national system of transportation, and must therefore consider the public interest of all concerned. Such a consideration, however, does

[45] As the Commission found (A. 50), the Conferences' contentions were that "a shift of divisions from the Southern lines would result in higher rates on Southern and interterritorial and intraterritorial traffic, and diminution of services, facilities, and equipment. Thus, they forsee the impairment of the ability of Southern shippers to compete in distant markets and diversion to other modes of transportation, thereby impeding the economic growth of the South." Indeed, it is doubtful whether such conjectural consequences would result solely from the Commission's order in question since the estimated $7.9 million reduction in Southern lines' revenues resulting from the new divisions is only 62/100 of 1% of the Southern lines' total revenues in the year tested, without an appropriate adjustment for income taxes (A. 80; A. 776).

> not by any means require a uniformity of divisions, nor can we find an affirmative virtue in it on this record. * * * Moreover, as pointed out in *New England Division Case*, 261 U.S. 184, 191 (1923), Section 15(6) was designed to help the weak "by preventing needed revenue from passing to prosperous connections." Thus, an adherence to uniformity as such, without a careful evaluation of the statutory criteria and the evidence of record, can hardly result in the fixing of just, reasonable, and equitable shares.[46]

With respect to the question of "inherent territorial disadvantages," several paragraphs of the district court's opinion discuss that issue in quixotic fashion (A. 340-343). Pointing out it was strenuously urged that "as a matter of law the Northern railroads cannot have an increase [in divisions] in the absence of inherent territorial advantages," the district court stated that it could not determine whether the Commission had resolved this issue. The court concluded that, if the Commission had resolved this issue, its determination suffered from a lack of findings and substantial evidence, and that, if it had not, the Commission had failed to resolve a material issue. Since

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[46] Compare these findings with the district court's erroneous characterizations thereof. (A. 351). The cases relied upon by the court do not stand for the proposition cited, *i.e.*, "that the Commission has consistently followed the view that the primary responsibility for meeting the cost and revenue needs of the railroads of any territory lies with the people and the industry of that territory." The overall purpose of Section 15(6), as expressed by this Court in the *New England Divisions Case*, and cited by the Commission above, is to the contrary. In fact, the concept stated here by the Commission is the one consistently followed.

the case was being reversed on other grounds, the lower court stated that upon remand the Commission "should decide and dispose of this contention in accordance with the Administrative Procedure Act." As the Commission pointed out, "In essence, however, other factors being equal, cost differences generally are the product of, and reflect, the inherent advantages and disadvantages that go to make up the respective overall transportation conditions in the two territories" (A. 51). Additionally, the Commission further stated:

> "Indeed, the continued maintenance of divisions which, all other things being equal, do not reflect the relative costs of service would not suggest justice between the parties. Such inequities being manifest here, we are of the opinion that divisions correcting them can result in no unlawful injury to the South" *(ibid.)*.

Thus, the Commission simply determined that, in a divisions case where the carriers were found to be efficient, their services were of equal importance to the public, and where the fairness of existing divisions and the need for revised divisions was assessed on the basis of relative fully distributed costs of service, it was appropriate to conclude that cost differences reflect inherent territorial disadvantages, insofar as that consideration is relevant under Section 15(6). The Commission's discussion establishes that it gave "due consideration" to all the evidence of record and the contentions of the parties with respect thereto[47]

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[47] The Conferences appear to be urging that since no difference exists in the physical or natural transportation condi-

and made findings which adequately informed the parties of its actions on their claims. Under these circumstances, no other findings were required by the Interstate Commerce Act, the Administrative Procedure Act, or decisions of this Court. See *Minneapolis & St. Louis R. Co.* v. *United States*, 361 U.S. 173, 193-194; and *N.L.R.B.* v. *Wichita Television Corp.*, 277 F.2d 579 (C.A. 10th 1960), cert. denied, 364 U.S. 871.

We submit, that while the Conferences are disappointed that the Commission was unable to accept their unsupported and novel concept that "sectional" rather than "national" interests should control the prescription of fair divisions, such disappointment falls far short of constituting error of law or fact. Their attempts to read a "sectional" concept into the "importance to the public" factor of Section 15(6) by relying on *New York* v. *United States*, *supra*, is foreign and contrary to the objective of maintaining an adequate national transportation system which Congress sought to achieve in the enactment of Section 15(6). See *New England Divisions Case*, 261 U.S. 184 at 189-190 and the National Transportation Policy, 49 U.S.C. preceding Section 1. The bulk of the arguments of the Conferences are directed to judgments that the Commission made, supported by evidence, on questions of transportation economics. See

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tions in either territory, the higher Northern costs must be attributed to inefficiency, overcapacity or a higher degree of industrialization in the North (Motion to Affirm, pp. 25-35). The Commission, however, considered and rejected these claims (See A. 31-33, 39).

S.E.C. v. *New England Elec. System*, 390 U.S. 209, 211, 213. Even if these arguments raised issues appropriate for judicial review, which they do not, the Conferences have failed to show any error by the Commission that would justify invalidation of its orders.[48]

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[48] In concluding that "the Commission has special responsibilities in a case of this magnitude" and must make more specific findings "when it departs from its prior finding" that equal factor divisions were appropriate, the district court erred (A. 351). This Court has held that an order of the Commission must be judged on its own merits and not by comparison with alleged inconsistent findings made in other proceedings. *Virginian Ry.* v. *United States*, 272 U.S. 658, 665-666; *Georgia P.S.C.* v. *United States*, 283 U.S. 765, 775. More specifically, this Court has held that it will not set aside a Commission order merely because the Commission has made different decisions during successive stages of the same controversy. *Manufacturers Ry. Co.* v. *United States*, 246 U.S. 457, 482; *Board of Trade* v. *United States*, 314 U.S. 534, 568. Here there is no inconsistency in the basis for initially prescribing equal factor divisions and subsequently prescribing higher divisions for the Northern lines. Both determinations rested on Rail Form A costs of service. In the first proceeding, the costs were found equal and, in the second, Northern costs were found to be higher. See *American Trucking* v. *A., T. & S. F. R. Co.*, 387 U.S. 397 at 416.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the district court should be reversed.

Respectfully submitted.

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